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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6579

WILLIE LLOYD TURNER,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

GERALD L. BALILES
Attorney General of Virginia

ROBERT H. ANDERSON, III
Assistant Attorney General
101 North Eighth Street
Richmond, Virginia 23219

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OPINION BELOW

In an unpublished opinion, the Supreme Court of Virginia on January 11, 1983, denied and dismissed petitioner's appeal from the Circuit Court of the County of Southampton's dismissal of his petition for a writ of habeas corpus.

JURISDICTION

The petitioner claims that jurisdiction is founded upon 28 U.S.C. § 1257(3).

QUESTION PRESENTED

I. Did The Trial Court Err In Dismissing The Petition For A Writ Of Habeas Corpus In Lieu Of Conducting A Plenary Hearing?

STATEMENT OF THE CASE

The petitioner was convicted of capital murder for the slaying of a jewelry store owner in Franklin, Virginia, during the commission of an armed robbery and was sentenced

to death on December 6, 1979. The trial court upheld the jury's recommendation and entered a final order on February 6, 1980. Petitioner's conviction was affirmed in all respects by the Supreme Court of Virginia in Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980). After the state Supreme Court denied a petition for a rehearing, the petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of the United States. On May 21, 1981, the Supreme Court dismissed this petition. Turner v. Virginia, 451 U.S. 1011 (1981).

Petitioner then filed a petition for a writ of habeas corpus on September 9, 1981, in the Circuit Court of Southampton County. After respondent filed a motion to dismiss, a hearing was held in the Circuit Court on November 10, 1981, in which the propriety of dismissing the petition on the basis of the pleadings and existing record in lieu of a plenary hearing was argued. While there was no transcription of the hearing on November 10, 1981, each party pursuant to Rules 5:9, 5:10 and 5:11 of the Rules of the Supreme Court of Virginia filed a proposed statement of facts setting forth what had occurred. The Circuit Court adopted all of respondent's proposed statement and a portion of the statement filed by petitioner. See Appendix A-1 - A-7.

Concerning the claim that the trial attorneys had failed to adequately investigate or present expert psychiatric evidence on behalf of petitioner at the trial, counsel for petitioner proffered that the attorneys had not consulted with any psychiatrists or psychiatric experts other than Dr. Robert Bransfield (who testified for petitioner at the penalty stage of his trial) in attempting to familiarize themselves with the psychiatric issues presented in the case. The petitioner's attorney also said that he could establish that the trial attorneys had not adequately researched comparable capital murder statutes in various other jurisdictions regarding the definition and application of the mitigating

factors set forth in § 19.2-264.4B of the Code of Virginia, 1950, as amended. Counsel also stated that the ineffectiveness of the trial attorneys was shown by their failure to prepare a jury instruction defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

In response, counsel for respondent referred the court to the testimony of Dr. Bransfield. Respondent argued that his direct testimony had been quite favorable to petitioner and that in particular he had been able to testify that petitioner had killed the decedent while under the influence of one of the mitigating factors set forth in § 19.2-264.4B. Respondent thus argued that the record established that on this issue, petitioner's trial attorneys had been effective in their representation.

On January 4, 1982, Circuit Court Judge Godwin issued a letter opinion in which he stated that he was sustaining respondent's motion to dismiss. On February 10, 1982, a final order was entered dismissing the petition for a writ of habeas corpus. This order was appealed to the Supreme Court of Virginia. By order of January 11, 1983, the Supreme Court dismissed the appeal. (Record No. 820828). The Court in part held that under the standards set forth in McMann v. Richardson, 397 U.S. 759 (1970), and Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978), the trial attorneys had been effective in their assistance. The Court further concluded that a plenary hearing had not been mandated.

ARGUMENT AGAINST GRANTING CERTIORARI

THE TRIAL COURT PROPERLY GRANTED RESPONDENT'S MOTION TO DISMISS WITHOUT FIRST CONDUCTING A PLENARY HEARING BECAUSE THE EXISTING RECORD ESTABLISHED THE ADEQUACY OF COUNSEL'S REPRESENTATION AT TRIAL.

In the present petition, petitioner challenges the effectiveness of trial counsel regarding the submission of

jury instructions and the introduction of psychiatric testimony on behalf of petition in the penalty stage of his trial. Respondent asserts that under the circumstances presented in this case, there was no need for a plenary hearing and the Circuit Court properly granted a motion to dismiss in the absence of such a hearing.

Initially, it is established that the failure of a state court to conduct a plenary hearing is not a federal question. See Welborn v. Cox, 337 F.Supp. 16 (W.D.Va. 1971). Pierce v. State of Oklahoma, 436 F.Supp. 1026, 1033 (W.D.Okla. 1977). Apart from this, respondent argues that petitioner has overstated the circumstances under which a plenary hearing will be required.

Respondent agrees that generally a hearing should be held where a petition alleges facts which, if proven, constitute grounds for habeas relief. However, it is not true "that every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing." Zambito v. Blair, 610 F.2d 1192 (4th Cir. 1979), cert. denied, 444 U.S. 928 (1980). Moreover, where the records of a habeas petitioner's criminal trial contain matters sufficient to refute the basic factual allegations underlying the petition, an evidentiary hearing is not mandatory. See Arey v. Peyton, 209 Va. 370, 164 S.E.2d 691 (1968); Larson v. Coiner, 351 F.Supp. 129 (N.D.W.Va. 1972). Finally, where an allegation on habeas corpus is patently frivolous or legally insufficient to justify relief even in the event that it can be proven, the petition may then be dismissed on the basis of the written pleadings. See generally Word v. Slayton, 337 F.Supp. 19 (W.D.Va. 1972); Younger v. Cox, 323 F.Supp. 412 (W.D.Va. 1971). See also Jackson v. Estelle, 548 F.2d 617 (5th Cir. 1977).

Respondent submits that the pre-existing record in the case at bar, along with the legal insufficiency of certain of the points raised by petitioner, were sufficient together

to justify the Circuit Court's conclusion that a plenary hearing was not required. The petitioner first argues that the trial attorneys failed to submit proposed jury instructions and otherwise insure that the jury would be fully instructed on the definitions and burdens of proof relating to the aggravating and mitigating factors applicable in the penalty stage of his trial. It is the position of the respondent, however, that the jury was properly instructed in accordance with applicable Virginia statutes.

Certainly, the jury was informed that the Commonwealth had the burden of proof beyond a reasonable doubt during the penalty stage of petitioner's criminal trial. Instruction 1 in the penalty stage told the jury that the Commonwealth was required to prove beyond a reasonable doubt either or both of the two (2) statutory aggravating circumstances set forth in § 19.2-264.2 of the Code of Virginia. See Appendix A-8. The Circuit Court further instructed the jury that if the Commonwealth proved beyond a reasonable doubt either of these two (2) alternatives, then it could, but was not obligated to, impose a sentence of death. If the Commonwealth failed to prove either alternative beyond a reasonable doubt, then the jury was required to fix petitioner's punishment at life. Likewise, Instruction 4 during the penalty stage instructed the jury on the applicable principles of law regarding the imposition of the death sentence. See Appendix A-9.

As for the complaint that the attorneys should have sought to define the aggravating and mitigating factors in instructions, respondent contends that decisions both of this Court and the Supreme Court of Virginia demonstrate that such a course of action would have been at best unnecessary and at worse futile. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court upheld a statute identical to the "vileness" criterion set forth in § 19.2-264.2, rejecting any argument that the statute would be construed to impose death in all

murder cases. The Court stated: "[T]here is no reason to think that juries will not be able to understand it." Id. at 202 n 54. See also Jurek v. Texas, 428 U.S. 262 (1976). Similarly, in Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135, cert. denied, 441 U.S. 967 (1979), the Supreme Court of Virginia upheld the facial constitutionality of both of the statutory aggravating factors. It is noteworthy that the limiting construction given by that Court in Smith to the term "aggravated battery" in the "vileness" factor was included in Instruction 1 in the penalty stage of petitioner's trial.

In considering the correctness of trial counsel's actions in the present case, respondent would also refer the Court to the decision in Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784, cert. denied, 444 U.S. 1049 (1980). There, the Supreme Court of Virginia stated: "We agree with the trial court that the terms used in the statute are commonly used and each has an accepted meaning. While the terms may have been defined in an instruction to the jury, in a manner satisfactory to this Court, the fact that the trial court did not choose to give such a definitional instruction does not constitute reversible error." 220 Va. 211. Respondent submits that if the trial court in the case at bar would not have been obligated to define the various aggravating factors beyond the language employed in the statute, certainly trial counsel could not be deemed constitutionally ineffective for not seeking such an amplification.

Respondent further asserts that there was no need on the part of petitioner's trial attorneys to provide definitions of the various mitigating factors. Certainly, any such definitions might have had the disadvantageous effect of placing a limiting gloss upon the otherwise broad language employed in the mitigating factors. Also, the evidence presented by petitioner at trial in mitigation of the offense related to the specific statutory factor that the crime had

been "committed while the defendant was under the influence of extreme mental or emotional disturbance." See infra. Respondent says that this term, like the aggravating language in Clark, supra, is one that is "commonly used" and which "has an accepted meaning." As in Clark, any further definition was not constitutionally mandated.

Respondent notes that in the present petition, petitioner cites no authority whatever to call into question the validity of the Supreme Court of Virginia's conclusion that these various terms require no further definition. In the absence of any such showing, petitioner can hardly establish the ineffectiveness of counsel for not proffering various instructions which would have been superfluous under established state law.

As to the claim that the trial attorneys did not adequately develop or present psychiatric testimony at petitioner's penalty stage, respondent says that the record clearly refutes any such contention. Dr. Robert C. Bransfield, a licensed psychiatrist who had examined petitioner on three (3) occasions after his arrest, testified in his behalf at the penalty stage of the proceedings. He stated that after petitioner had been placed on medication, he "showed an improvement in his depressive symptoms, and he showed an improvement in his psychotic tendencies after being placed on it." (December 5, 1979, Tr. 58). After describing petitioner's past history, which was both difficult and deprived, and also his recurring auditory illusions, Bransfield testified that his "final impression was anti-social personality with paranoid tendencies. He showed a combination of both paranoid tendencies and anti-social tendencies and I felt that the paranoid tendencies tended to come out more in times of stress . . . ." (Tr. 62). The psychiatrist then mentioned a number of personal difficulties suffered by petitioner shortly before the commission of the capital murder which resulted in petitioner "showing an

increased amount of paranoid symptoms at that time [which made him seem] like he was becoming more depressed and more rigid than he normally would have been . . . ." (Tr. 64). Bransfield further opined that if petitioner had been medically treated at the time of the homicide, he would not have killed the decedent. (Tr. 98). Most importantly, he was asked whether, based on his examination of petitioner and his review both of his past history and of the criminal acts charged against him, he had an opinion "with reasonable medical certainty as to whether this crime was committed while Willie Turner was under the influence of extreme mental or emotional disturbance." Bransfield testified that he felt petitioner "was under the influence of mental disturbance while he was committing the crime." (Tr. 69). This answer precisely tracked the statutory language contained in § 19.2-264.4B.

Respondent says that it is difficult to imagine testimony, which, if credited by the trier of fact, would be more likely to result in the lesser sentence of life imprisonment. This was obviously not a case akin to Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978), where the attorney failed to investigate or present at trial psychiatric testimony. On the contrary, this testimony was immensely helpful to petitioner. Present counsel for petitioner admitted as much on direct appeal to the Supreme Court of Virginia when they stated that "the psychiatric observations of Dr. Bransfield are helpful in assessing the degree of depravity or culpability" of petitioner in committing the capital murder. Opening Brief of Appellant at 46. (Record No. 800375).

Not surprisingly, Bransfield was subjected to vigorous cross-examination. Whatever difficulty he may have encountered during this cross-examination certainly had nothing to do with the alleged failure of defense counsel to consult with any psychiatric experts apart from Dr. Bransfield or to extensively research capital murder statutes in other

jurisdictions relative to the definition and application of the statutory mitigating factors set forth in § 19.2-264.4B. As the Circuit Court observed in its letter opinion of January 4, 1982, any problems encountered by Bransfield on cross-examination "could not be pre-determined by defense counsel." Respondent submits that the testimony of Bransfield, when considered in its totality, unambiguously demonstrates that at a minimum counsel presented evidence which created a significant issue of fact for the jury to consider in determining which penalty to impose upon petitioner. The fact that this testimony ultimately proved unavailing to petitioner does not render ineffective the assistance accorded him by his trial attorneys. Contrary to any intimation by petitioner, trial counsel who represent a capital defendant given a sentence of death are not ipso facto ineffective because of the penalty meted out.

Respondent also says that the record in no way supports petitioner's claim that Dr. Bransfield testified that petitioner would not be dangerous in the future, which in turn permitted the Commonwealth's Attorney to attempt to establish that petitioner presented such a danger. On the contrary, at no point during his entire testimony was Bransfield specifically asked to make any prediction as to petitioner's future dangerousness, nor did he ever express any such opinion. While his testimony certainly in some sense shed light on this issue, the same would be equally true of almost any evidence presented by either side in any capital case during the penalty stage. Any evidence relative to a defendant's background, or the nature of the acts that he has been found to have committed is in some sense indicative of the future menace that he may pose to society. In the case at bar, however, what directly tended to establish petitioner's future dangerousness was the introduction of his extensive criminal record, which was introduced by the Commonwealth well before any testimony by Bransfield.

Finally, given the nature of the testimony that was introduced by defense counsel at petitioner's trial, when petitioner nevertheless asserts that the attorneys were not effective, it becomes clear that he is imposing upon counsel in capital cases a vague, thoroughly ill-defined and ultimately unsustainable burden. In any capital case where a death sentence is given, it can always be argued that if one more psychiatrist had been called as a defense witness or one other statute from a foreign jurisdiction had been consulted and relied upon, a life sentence would have thereby resulted. However, a line must be drawn at some place; in determining the issue of an attorney's effectiveness, a court must at some point conclude that certain actions, even if theoretically helpful, are not constitutionally mandated. Respondent submits that the acts of omission complained of by petitioner in the present case are actions that were not constitutionally obligatory upon petitioner's trial lawyers.

In this regard, it should be noted that an attorney is not invariably required to investigate or raise an insanity defense. See Proffitt v. United States, 582 F.2d 854 (4th Cir. 1978). See also Springer v. Collins, 586 F.2d 329 (4th Cir. 1978). In considering whether an attorney has been incompetent in his presentation of an insanity defense, a court should remember that counsel is not ineffective even though he may have made an undesirable tactical decision at trial. See United States ex rel Heral v. Franzen, 667 F.2d 633 (7th Cir. 1981). Counsel should not be second guessed on stategy as basic as the examination of a witness. See Sallie v. State of North Carolina, 587 F.2d 636 (4th Cir. 1978). A habeas corpus petitioner has a heavy burden to establish that his trial attorney was ineffective and that he was impermissibly prejudiced as a result of such incompetence. See Drake v. Wyrick, 640 F.2d 912 (4th Cir. 1981). As one court has stated: "[C]omplaints of uncalled witnesses are not favored, because a presentation of testimonial evidence

is a matter of trial strategy, and because allegations of what a witness would have testified are largely speculative." Boyd v. Estelle, 661 F.2d 388 (5th Cir. 1981).

In considering the claims in the present petition, this Court should keep these various principles in mind. Respondent says that petitioner's trial attorneys should not be held ineffective on the basis of the sheerest sort of speculation as to what other unnamed witnesses might have testified to. In this regard, respondent would refer this Court to the decision in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981). There, the court in holding that a capital murder defendant given the death sentence had received effective representation by his attorney ruled that the legal standard applicable in judging the adequacy of counsel was the same in both non-capital and capital cases. On the issue of an attorney's duty to investigate in a capital case, the court offered the following observation highly pertinent to the case at bar:

> "This duty to investigate and prepare is . . . far from limitless, and not every breach thereof will mean that counsel has failed to render reasonably effective assistance . . . . [C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers . . . . [C]ounsel's effectiveness may not be assessed through the finely ground lens of 20-20 hindsight -- and this command is especially compelling in reviewing claims of ineffective assistance that are grounded in allegations of inadequate investigation and preparation." 655 F.2d 1356.

Finally, it is the position of respondent that petitioner's recommended form of relief in this case -- namely, that the matter be remanded to the state circuit court for a plenary hearing -- is not well-taken. Supposedly, such a state hearing would serve to effectuate such "federal policies" as federalism, comity and judicial economy.

Respondent submits that plenary hearings should be required not on the ground of "policies" but rather only on the basis of the inadequacy of the existing record and the pleadings in the case. Respondent would also argue that

none of the expressed concerns of petitioner would be served by a return to the state courts in this case.

It is not correct to assert that the courts in Virginia have failed or refused to consider the claimed ineffectiveness of petitioner's trial counsel. On the contrary, both the Circuit Court and the Supreme Court of Virginia have reviewed the record and the pleadings and have determined that in fact petitioner did receive competent assistance of counsel. The mere fact that these courts have made this determination in a context other than that advocated by petitioner does not mean that these courts have not addressed this issue. Federalism and comity are hardly served by requiring a state to consider an issue for a second time after it has already dismissed it on the merits. Likewise, judicial economy can hardly obtain in this case when it might reasonably be anticipated that in the event of a state plenary hearing resulting in the dismissal of the habeas corpus petition, petitioner would then seek a second evidentiary hearing in a federal forum.

CONCLUSION

For the reasons presented, the respondent respectfully contends that the issues raised in this case are neither important nor substantial and accordingly asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

GERALD L. BALILES
Attorney General of Virginia

ROBERT H. ANDERSON, III
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that I, Robert H. Anderson, III, Assistant Attorney General of Virginia, am a member of the Bar of the Supreme Court of the United States, and on the 11th day of May, 1983, I mailed, with first class postage

prepaid, a copy of the Respondent's Brief in Opposition to Granting of Writ of Certiorari to J. Lloyd Snook, III, Lowe, Gordon, Jacobs & Snook, Ltd., 409 Park Street, Charlottesville, Virginia 22901, counsel for petitioner.

Robert H. Anderson III

Robert H. Anderson, III
Assistant Attorney General

APPENDIX

VIRGINIA

IN THE CIRCUIT COURT FOR THE COUNTY OF SOUTHAMPTON

WILLIE LLOYD TURNER,

Petitioner

v.

EDWARD C. MORRIS,

Respondent

STATEMENT OF FACTS

Comes now your Petitioner, Willie Lloyd Turner, by counsel, and presents this Statement of Facts, pursuant to Rule 5:9 of the Supreme Court of Virginia. In addition to the matters already of record, Petitioner notes the following additional facts relating to the hearing on November 10, 1981:

1. Counsel for Petitioner and counsel for Respondent had agreed before the hearing that it would not be necessary or desirable to present evidence in support of or in opposition to Petitioner's allegations. The hearing was intended to allow the Court to determine whether a plenary hearing was necessary.

2. Since most of the issues were legal issues or were claims that had already been presented to and rejected by the Virginia Supreme Court, counsel focused the Court's attention on two issues:

a. Petitioner's allegation that the procedures of the Virginia Supreme Court for reviewing death sentences were inadequate, and

b. Petitioner's allegation of ineffective assistance of counsel.

3. In oral argument, which was not recorded or transcribed, counsel for Petitioner detailed the allegations of

LAW OFFICES
LOWE, GORDON,
JACOBS & SNOOK, LTD.
CHARLOTTESVILLE, VA.
(804) 295-8158

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ineffective assistance of counsel, suggesting that counsel's ineffectiveness fit into two categories:

a. Failure to prepare for trial on the psychiatric issues by failing to research the psychiatric issues of the case; and

b. Failure to develop, with the help of Dr. Bransfield, ways to explain the concepts of the mitigating circumstances to a lay jury.

4. In oral argument, counsel outlined the evidence that he proposed to present in support of Petitioner's claim of ineffective assistance of counsel. Counsel offered to prove:

a. That defense counsel did not consult other psychiatrists or psychiatric experts in an effort to inform themselves about the psychiatric issues involved in this case.

b. That the only background research performed by defense counsel on psychiatric issues in preparation for trial was to review the selections from the American Psychiatric Association's Diagnostic and Statistical Manual, which had been sent to counsel by Dr. Bransfield with his letter of January 19, 1979.

c. That counsel did not consult with other psychiatrists in an effort to learn more about the psychiatric issues involved in this case.

~~d. That counsel did not research the prognostic implications of Dr. Bransfield's diagnosis.~~

e. That counsel did not research the case law of other states -- notably California -- in which the mitigating circumstances enumerated in the death penalty statute were defined.

f. That counsel did not prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

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LOWE, GORDON,
JACOBS & SNOOK, LTD.
CHARLOTTESVILLE, VA.
(804) 296-8188

~~5. This offer of proof was not contested by counsel for Respondent.~~

WILLIE LLOYD TURNER

By Counsel

J. Lloyd Snook, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

CERTIFICATE

I hereby certify that I have today mailed a copy of the foregoing Statement of Facts to Robert H. Anderson, Assistant Attorney General, 101 N. Ninth Street, Richmond, Virginia 23219.

J. Lloyd Snook, III

June 3, 1982

James C. Gordon

LAW OFFICES
LOWE, GORDON,
JACOBS & SNOOK, LTD.
CHARLOTTESVILLE, VA.
(804) 296-8188

VIRGINIA:

IN THE CIRCUIT COURT OF SOUTHAMPTON COUNTY

WILLIE LLOYD TURNER,

Petitioner,

v.

EDWARD C. MORRIS,

Respondent.

STATEMENT OF FACTS

1. The purpose of the hearing was to afford counsel for each party the opportunity to present legal arguments as to whether respondent's motion to dismiss the habeas corpus petition should be granted in lieu of having a plenary hearing.

2. At the outset of the hearing, counsel for petitioner acknowledged that the only grounds that had not previously been raised either at trial or on direct appeal to the Supreme Court of Virginia and thus which were now reviewable were the matters contained in allegations (2), (3), (12) and (16) in the petition. Counsel then presented arguments concerning allegations (2), (12) and (16). No arguments regarding allegation (3) were presented by either party.

3. With respect to allegation (2), counsel for petitioner referred to a study which was under preparation and which was alleged to deal with the application of the death penalty in Virginia. Counsel stated that he hoped that the study would be ready in two to three weeks but was unable to represent to the Court when it might be available and also was not in the

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position to indicate what the ultimate findings were likely to be. Counsel additionally stated that trial counsel for petitioner had known nothing about such a pending study at the time of the trial.

4. With respect to allegation (12), counsel for petitioner presented various arguments in support of his claim that trial counsel had failed to adequately investigate or present expert psychiatric evidence on behalf of petitioner at trial. In part, counsel proffered that defense counsel had not consulted any psychiatrists or psychiatric experts other than Dr. Bransfield in attempting to familiarize themselves with the psychiatric issues involved in the case. Counsel also offered to establish that the trial attorneys had not adequately researched comparable capital murder statutes in various other jurisdictions regarding the definition and application of the mitigating factors set forth in § 19.2-264.4B of the Code of Virginia (1950), as amended. Petitioner's attorney also challenged the failure of trial counsel to prepare jury instructions defining the terms "extreme mental or emotional disturbance" or "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."

5. In response to these arguments, counsel for respondent referred the court to the testimony of Dr. Robert Bransfield, a witness for petitioner. Dr. Bransfield was permitted on direct examination to testify that in his view petitioner was under the influence of mental disturbance while he was committing the crime. It was pointed out that this answer precisely tracked the language set forth in § 19.2-264.4B.

6. With respect to allegation (16), counsel for the opposing parties briefly presented arguments consistent with the contentions advanced in the petition for a writ of habeas corpus and Motion to Dismiss, respectively.

7. At the conclusion of the hearing, the Court indicated that it would take the case under advisement. By order of February 10, 1982, the court denied and dismissed the petition.

June 3, 1982

James C. Godbold

Commonwealth of Virginia

JAMES C. GODWIN
JUDGE
SUFFOLK, VIRGINIA 23434

BENJAMIN A. WILLIAMS, JR.
JUDGE
COURTLAND, VIRGINIA 23837

E. EVERETT BAGNELL
JUDGE
SUFFOLK, VIRGINIA 23434

Fifth Judicial Circuit

CITIES OF
SUFFOLK
FRANKLIN

COUNTIES OF
SOUTHAMPTON
ISLE OF WIGHT

June 3, 1982

Robert H. Anderson, III, Esquire
Assistant Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219

J. Lloyd Snook, III, Esquire
Attorney at Law
409 Park Street
Charlottesville, Virginia 22901

In Re: Willie Lloyd Turner v. Edward C. Morris

Gentlemen:

With regard to statements of facts filed on behalf of both the Petitioner and the Respondent in the above captioned matter, I am today signing both statements of facts but sustaining Respondent's objection to (4-d) and (5) in Petitioner's proposed statement of facts. The statements of facts will be mailed today to the Clerk of the Supreme Court.

Yours very truly,

James C. Godwin

JCG:dee

Instr. 1
2nd stage

#1

INSTRUCTION 1

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following alternatives:

(1) That, after consideration of his past criminal record, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

(2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt either of the two alternatives, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment.

If the Commonwealth has failed to prove either alternative beyond a reasonable doubt, then you shall fix the punishment of the defendant at life imprisonment.

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Inst. 4 2nd stage

#4

INSTRUCTION 4

The Court instructs the jury that in this proceeding, as in the former where you determined the guilt of the defendant, the burden is upon the Commonwealth to prove each and every fact required for imposition of the death penalty, as set forth in other instructions of this Court, by evidence so strong, so clear, and so conclusive that there is left in the minds of the jury no reasonable doubt. Where the evidence is susceptible to two interpretations, one consistent with the imposition of the death penalty, and the other with the imposition of life imprisonment, you should not adopt that interpretation which is consistent with imposition of the death penalty.

If, therefore, upon a consideration of all the evidence, there exists in your minds a reasonable doubt as to any fact or conclusion you are required to find before the death penalty may be imposed, you shall recommend a sentence of life imprisonment.